NO. 48907-4-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

DENNIS J. W. FISHER,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR CLALLAM COUNTY

Brian P. Coughenour, Judge

SUPPLEMENTAL BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Trial counsel's failure to challenge an unlawful search and failure to seek suppression of evidence seized during the unlawful search denied appellant effective representation.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Appellant was charged with possession of heroin following a warrantless search. Fisher was initially contacted by police on the basis of a domestic dispute alleged in a call to police. No weapons were alleged by the caller. In the course of a weapons search, the officer found a "dime bag" of heroin in a coin pocket located inside the main pocket of Fisher's jeans. Counsel failed to seek suppression of the unlawfully seized evidence. May the issue of ineffective assistance of counsel be raised for the first time on appeal and is the record sufficiently developed, where the appellant has raised an issue of constitutional magnitude–that the appellant was denied his constitutional right to effective assistance of counsel where there was no conceivable legitimate tactic or strategy for counsel's failure to bring a motion to suppress?

C. STATEMENT OF FACTS

The pertinent facts are set forth in the opening brief of appellant , with the additional fact that counsel did not move for suppression of the evidence pursuant to CrR 3.6.

D. ARGUMENT

1. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO MOVE TO SUPRESS THE EVIDENCE OBTAINED PURSUANT TO AN ILLEGAL WARRANTLESS SEARCH, WHICH IS MANIFEST ERROR THAT MAY BE RAISED FOR THE FIRST TIME ON APPEAL

As argued in Fisher's opening brief, the weapons search of his pockets, including a "watch pocket" in his jeans, was illegal where Forks Police Officer Julie Goode was unable to point to specific, articulable facts giving rise to an objectively reasonable belief that Fisher could be armed or present a threat to officer safely, and that the "weapons frisk" of his pocket exceeded the permissible scope of the search after determining that he did not have a weapon on his person. Appellant's Brief at 11-24. Should this Court find that trial counsel waived the errors claimed and argued in the opening brief by failing to move to suppress evidence for exactly the same reasons, then both elements of ineffective assistance of counsel have been established.

Trial counsel should have moved to suppress the evidence obtained as a result of the warrantless search. There was no apparent strategic advantage to be gained by failing to move suppress the fruits of an illegal search. The failure to move to suppress constitutes deficient performance by defense counsel. Counsel's deficient performance rose to the level of constitutionally ineffective assistance because of the resulting prejudice to the Fisher. The record does not reveal any tactical or strategic reason why trial counsel would have failed to move to suppress the evidence. Moreover, if counsel had done

so, the motion would have been granted under the law set forth in the appellant's opening brief at 11-24.

a. Ineffective assistance of counsel may be raised for the first time on appeal.

Effective assistance of counsel is guaranteed by both U.S. Const. amend. VI and Wash. Const. art. I, § 22 (amend. x). RAP 2.5(a) provides that an appellant may raise an error for the first time on appeal if it is a "manifest error affecting a constitutional right". RAP 2.5(a)(3); *State v. Scott*, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988); *State v. Lynn*, 67 Wn. App. 339, 342, 835 P.2d 251 (1992). An error is manifest when it is "truly of constitutional magnitude" and when the error is prejudicial to the defendant's rights. *Scott*, 110 Wn.2d at 688, 757 P.2d 492. The record must contain facts to the support the allegation of prejudice. *State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993).

A party may not raise a claim of error on appeal that was not raised at trial unless the claim involves (1) trial court jurisdiction; (2) failure to establish facts upon which relief can be granted; or (3) manifest error affecting a constitutional right. RAP 2.5(a). Regarding the latter type of claims, the Supreme Court has noted that "'constitutional errors are treated specially because they often result in serious injustice to the accused.'" *State v. Kirkpatrick*, 160 Wn.2d 873, 879, 161 P.3d 990 (2007) (quoting *State v. Scott*, 110 Wn.2d 682, 686, 757 P.2d 492 (1988)).

In order raise an error for the first time on appeal under RAP 2.5(a)(3), an appellant must demonstrate (1) the error is manifest, and (2) the error is truly of constitutional dimension. *State v. Kirkman*, 159 Wn.2d 918,

926, 155 P.3d 125 (2007). In other words, an appellant must "identify a constitutional error and show how the alleged error actually affected the [appellant]'s rights at trial." *Kirkman*, 159 Wn.2d at 926-27. To establish that an error is "manifest," the appellant must "show actual prejudice." *State v. Contreras*, 92 Wn.App. 307, 311, 966 P.2d 915 (1998).

The manifest error affecting a constitutional right in the instant case is counsel's failure to object to the warrantless search of his pockets. Had counsel raised the issue and moved to suppress, the motion would have been granted because there was an insufficient factual basis for the intrusion into the watch pocket to justify the search pursuant to officer safety. (See Appellant's Opening Brief at 11-24.)

Fisher's claim that his trial attorney provided ineffective assistance is unquestionably constitutional in nature. *State v. Davis*, 60 Wn. App. 813, 822-23, 808 P.2d 167 (1991) (claims of ineffective assistance of counsel are of constitutional magnitude and may be raised for the first time on appeal). His claim of error may also be deemed manifest in that, had he successfully brought a motion to suppress as required by CrR 3.6, the warrantless, illegal search and the controlled substance obtained as result of the impermissible search of the inner watch pocket, would have excluded. Consequently, the State's case against Fisher would have been dismissed. Consequently, assuming there was error, it clearly had "practical and identifiable consequences in the trial of the case." *State v. Stein,* 144 Wn.2d 236, 240, 27 P.3d 184 (2001).

b. The record was sufficiently developed for the court to determine that Fisher was denied effective assistance of counsel by his counsel's failure to move to suppress

Where the alleged constitutional error arises from trial counsel's failure to move to suppress, the defendant "must show the trial court likely would have granted the motion if made. It is not enough that the [d]efendant allege prejudice; actual prejudice must appear in the record." *State v. McFarland*, 127 Wn.2d 322, 334, 899 P.2d 1251 (1995). If the record from the trial court is insufficient to determine the merits of the constitutional claim, then the claimed error is not manifest and review is not warranted. *State v. WWJ Corp.*, 138 Wn.2d 595, 602, 980 P.2d 1257 (1999), citing *McFarland*, 127 Wn.2d at 333 and inviting comparison to *State v. Contreras*, 92 Wn. App. 307, 311-14, 966 P.2d 915 (1998). Where the record is sufficiently developed for an appellate court to determine whether a motion to suppress clearly would have been granted or denied, review is proper of the suppression issue, even in the absence of a motion and trial court ruling thereon. *Contreras,* 92 Wn. App. at 314.

Here, the record is sufficiently developed for review. As discussed in his opening brief, the warrantless search of Fisher's pocket was not justified by any exceptions to the requirement of a search warrant. The State's entire case regarding the charge of possession of heroin was a result of the warrantless search. Therefore, the error is manifest.

In *McFarland*, the Court addressed the issue of whether or not a defendant could challenge a warrantless arrest for the first time on appeal in the context of an ineffective assistance of counsel claim. *McFarland*, 127 Wn.2d at 332. The *McFarland* Court determined that the warrantless arrest could not be challenged independent of an ineffective

assistance of counsel argument for the first time on appeal under RAP 2.5(a)(3) because, in order for the error to be a "manifest error," the trial record had to be sufficient to permit the Court of Appeals to address the issue in the case. *McFarland,* 127 Wn.2d at 332-334. The Court held that the failure of trial counsel to raise the issue at trial resulted in a record that was too poorly developed to allow the appellate court to analyze the issues, and, therefore, this meant that the errors were not sufficiently "manifest" in the record to permit review under RAP 2.5(a)(3). *McFarland,* 127 Wn.2d at 332-334.

This is in contrast to *State v. Reichenbach,* 153 Wn.2d 126, 101 P.3d 80 (2004). In *Reichenbach,* the defendant was charged with possession of methamphetamine after police found the drug inside his car during execution of a search warrant. *Reichenbach,* 153 Wn.2d at 128-29. Reichenbach's defense attorney failed to move to suppress the drugs "despite serious questions about the validity of the warrant upon which the search was based." *Reichenbach,* 153 Wn.2d at 131. Reichenbach argued for the first time on appeal that his attorney was ineffective for failing to move suppress the methamphetamine. The Supreme Court reached a determination of the ineffective assistance issue on the merits, and therefore determined that the trial court record was sufficiently clear to show that motion to suppress should have been granted even though evidence was not challenged below and the issue was raised for first time on appeal. *Reichenbach,* 153 Wn.2d at 136.

In this case, the record regarding the weapons frisk, lifting his shirt, and intrusion into Fisher's pockets was fully developed at trial, despite the

absence of a CrR 3.6. hearing. RP at 125, 133. Officer Goode stopped Fisher's SUV following a report that he had kicked in a bedroom door in a house, entered the room, yelled at the occupant and drew his hand back as if he was going to hit the occupant, and then left. CP 97. Fisher's SUV was stopped and Officer Goode conducted a pat down search and saw a "big bulge" in his front right pants pocket, did not touch or manipulate the bulge, but lifted his shirt. RP at 125. After lifting his shirt the officer saw a coin pocket inside the main pocket of his jeans. RP at 125. The record shows that the officer reached into an inner coin pocket and took out a small plastic "dime bag," later determined to be heroin. RP at 125. During her testimony, Officer Goode did not state she felt the "dime bag" during the pat down, nor that she saw any part of the bag even after she lifted his shirt. RP at 125, 133-34.

Just as was the case in *Reichenbach*, the record is sufficiently developed for the court to find that Fisher has demonstrated that a motion to suppress would have been granted if brought by trial counsel. Unlike *McFarland*, there is no part of the record that is lacking. Counsel for both the State and defense fully elicited testimony from the officer regarding her pat down search. RP at 125, 133-34. The questions asked of Officer Goode on direct and cross-examination went directly to the issue of whether she had a reasonable, articulable suspicion permitting her to search Fisher's pockets and to lift his shirt to obtain a view of his pockets.

The trial court did not rule on the issue of suppression not because the record was lacking as to whether such a motion should have been granted, but merely because defense counsel failed to bring a motion pursuant to CrR 3.6

in the first place.

The record does not reveal any tactical or strategic reason why trial counsel would have failed to move to suppress the evidence. Counsel's failure to file a motion to suppress was unreasonable under the circumstances of this case, since there was no reason to believe such a motion would have been denied. Suppression was required because no circumstances existed which would have justified the warrantless illegal search of his pockets or the lifting of his shirt. Counsel did not unsuccessfully seek suppression on other grounds, and then reasonably conclude further attempts would be similarly unsuccessful. Rather, no attempt was made at trial to suppress the evidence seized.

Moreover, the record clearly establishes that a motion to suppress was the only legitimate tactical choice. With the evidence suppressed, the State would have no evidence of possession, and the charge against Fisher would have been dismissed. The only alternative to suppression, and the course taken by counsel at trial, was to present Fisher's testimony that he was "surprised" to be under arrest and to deny that he had heroin on his person. RP at 178-79. This defense was wholly dependent upon Fisher's credibility. Under these circumstances, a decision not to pursue suppression could not be considered a legitimate trial strategy

The prejudice here is self-evident. But for counsel's failure to move to suppress the evidence on the grounds argued herein and in the appellant's opening brief, there would have been insufficient evidence to convict Fisher. Counsel's performance was deficient and deprived Fisher of his constitutional right to effective assistance of counsel, thus requiring reversal

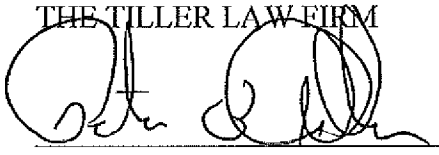
of his conviction.

E. CONCLUSION

Based on the forgoing, as well as the previously submitted brief of the appellant, counsel's failure to move to suppress based on an illegal search by the officer was both deficient and prejudicial. For these reasons, Fisher's conviction should be reversed and dismissed.

DATED: January 18, 2017.

Respectfully submitted,
THE TILLER LAW FIRM



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CERTIFICATE OF SERVICE

The undersigned certifies that on January 18, 2017, that this Appellant's Opening Brief was sent by the JIS link to Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and copies were mailed by U.S. mail, postage prepaid, to the Mr. Dennis J.W. Fisher and a copy was e-mailed to Jesse Espinoza:

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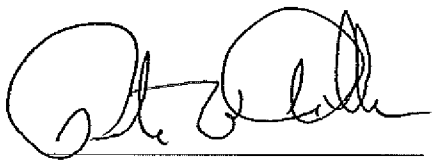
This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on January 18, 2017.



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